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Supreme Court of the United States

OCTOBER TERM 1969

No. 694

CARMINE PANICO and CARLIE DiPIETRO,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Joint Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONERS' JOINT REPLY TO BRIEF IN OPPOSITION TO CERTIORARI

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I

We noted in our petition for certiorari herein, *passim*, that until this case reached its present stage of a §2255 post-conviction review effort by the present petitioners, everyone on the Government's side of this 1962 narcotics

prosecution, as well as the trial Judge and the Court of Appeals Judges in the direct review proceedings in 1962-63 were perfectly content to let the narcotics convictions rest on the then adjudicated finding that Salvatore Panico's sensational misconduct in the 1962 trial was not caused by any uncontrollable psychological condition.

Our petition for certiorari herein also points out that in both of the Courts below, in this §2255 proceeding, the Government's lawyers and the Judges apparently had no difficulty in switching from the original 1962-1963 theory that Salvatore Panico was conspiratorially faking insanity, to the new (second-thought) theory that after all it does not matter whether Salvatore was actually crazy or not, because even if he was actually every bit as insanely helpless to control himself in the 1962 trial as the co-defendants were claiming he was at that time and in the subsequent direct review proceeding, it would not have made any difference in deciding the 1962-1963 issue of prejudice caused to Salvatore's co-defendants by Salvatore's insane behavior, since all that counts is whether the trial Judge adequately cautioned the jury for the protection of the co-defendants in regard to Salvatore's mad acts.

Now, in the Brief In Opposition herein, the Solicitor General's office has lent its prestige to this metamorphosed strategy of the prosecution and of the Courts below for the salvaging of these narcotics convictions. Thus, at p. 11 (Br. In Opp.) it is stated, "The fairness of the trial of petitioners does not depend upon whether Salvatore's insanity was real or feigned, or whether he was competent or incompetent to stand trial. The question is whether his acts, however prompted, deprived them of a fair trial." Again, at pp. 12-13 (*ibid.*) it is stated, "The question was the fairness of petitioners' trial, not the mental condition of Salvatore Panico."

Judges and lawyers pass their working lives in a professional environment where the proper modes of discourse include resort to formulation of "alternative" positions of reasoning or argument. But in this present case of Panico and DiPietro one cannot but feel surprised at the *extreme* to which the "alternative" technique has now been carried by Government counsel and by the Courts below.

For, in the *abruptly new switch-over* "alternative" argumentation and reasoning, respectively, of the Government lawyers and of the Courts below in this §2255 case, we are being told in effect—for the first time in this eight-year old case—(1) that Salvatore Panico was not a helplessly uncontrollable maniac, *and/or* (2) that it does not matter if he was because this particular (alternatively-assumedly) helplessly uncontrollable maniac was in a conspiratorial plot with the co-defendants to make believe that he was a maniac for the purpose of wrecking the trial.

Paraphrasing words spoken five score and two years ago by a man imbued with the sense of history: "The world will little note nor long remember" a denial of certiorari in this case to Carmine Panico and Carlie DiPietro; but "it will never forget"—unless future historians of due process and of the federal criminal prosecutive decencies fail in their task—what Government counsel and the Courts below have done in this case in their egregious utilization of the "alternative" formulary techniques of our profession.

II

Also distressing is the Solicitor General's resort to an argument suggesting some sort of laches on our part in raising the question of the accuracy of the Government's

1963 presentation to this Court concerning Salvatore Panico's final Dannemora diagnosis. At p. 12, Br. In Opp., it is stated, "Even assuming that counsel were unaware of the nature of the final proceedings at Dannemora, despite the fact that the Government had lodged a copy with the Court and had briefly but accurately stated its substance, counsel admittedly knew of them in the spring of 1965, but took no action until three years later."

First, we are obliged to ask, in all respectful protest, what does the Government mean when it uses the above quoted words "Even assuming that counsel were unaware", etc.? Does the Government mean that despite our (undersigned counsels') unequivocal assurances to the Courts below and to this Court (Pet. Cert., pp. 25-26, and see especially the first footnote on p. 26; pp. 33-38, and see especially pp. 36-38; p. 41; p. 43), there persists some doubt as to our (undersigned counsels') truthfulness in thus having assured this Court, on our professional honor, that we absolutely knew nothing about the *actual contents* of the Dannemora Clinical Summary until about ten days after Mr. Glasser's telephone call to the Clerk of this Court on December 24, 1963 (see Pet. Cert., pp. 36-38)?*

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* The writer of the Brief In Opposition herein was apparently willing to impugn our (undersigned counsels') good faith as to our assurance that we never saw the Dannemora Clinical Summary until about ten days after Mr. Glasser's telephone conversation with the Clerk on December 24, 1963, yet said writer of the Brief In Opposition has apparently seen fit to "avoid like the plague" our detailed factual account to this Court as to how and when we first got knowledge of the *actual contents* of the Dannemora Clinical Summary as distinct from the Government's misleading description of that paper to this Court in the 1963 certiorari proceedings (see, again, Pet. Cert. herein, pp. 36-38).

Second, we reply as follows to the suggestion in the Brief In Opposition (p. 12) that our clients, the petitioners Panico and DiPietro, should now suffer because "counsel admittedly knew of [the contents of the Dannemora papers] in the spring of 1965, but took no action until three years later":

It has remained for the writer of the within Brief In Opposition to invoke this unfortunate argument in the nature of laches. In the Courts below neither the Government nor any of the Judges invoked against us any such unworthy contention of laches. True, one expects the office of the Solicitor General of the United States, when Government cases reach Supreme Court level, to "find something" that may have been "missed" in the prior handling of the case. But in this instance the Solicitor General's argument in the nature of laches is *refuted by the record,* which apparently was perceived by Government counsel and by the Judges in the Courts below, but apparently did not come to the attention of the writer of the Brief In Opposition herein. We quote from the §2255 affidavit of counsel (Jerome Lewis, affidavit sworn to April 16, 1968), appearing in the record herein at A66a-A68a, A76a-A79a:

> "I have now carried these chronological recitals down to June 13, 1963, the date of the Court of Appeals' affirmance of the narcotics convictions of Carmine Panico and Carlie DiPietro, which was some eleven months after their and Salvatore's narcotics conviction and the practically immediately ensuing State findings that Salvatore was schizophrenic.
>
> "It now becomes pertinent to make the following chronologically relevant averments: It will be re-

called that Salvatore had gone into the limbo of Dannemora as an adjudicated schizophrenic on August 22, 1962, his brother Carmine meanwhile remaining incarcerated serving his narcotics sentence. The Panico brothers' immediate family relatives, represented by another brother, were meanwhile being my 'contact' with the respective situations of Salvatore and Carmine. But this 'contact' was handicapped by those all too usual and familiar circumstances which one encounters when dealing with close family relatives of persons who have suffered life catastrophes of the kind which was here involved in the cases of Salvatore and Carmine Panico during the period of which I am now speaking (mid-1962 to mid-1963). All that I knew, and apparently all that the Panicos' relatives knew, about Salvatore during the period in question was that he was continuing to undergo confinement and treatment as an insane person at Dannemora.* Besides, Salvatore's within narcotics conviction having been reversed by the Court of Appeals, and his tragic lodgment at Dannemora appearing to be irretrievable at least *pro tem* so far as we then knew, it was natural (I submit) that my own primary attention should be focused on Carmine's case during the period in question. All in all, the fact is, and I so aver, that I literally had no information about Salvatore's condition or progress at Dannemora during the period in question (mid-1962 to mid-1963) other than that he was there under confine-

* "Salvatore's New York State confinement, incidentally, was under a then still operative State Prison sentence for a crime not connected with the within Federal narcotics case."

ment and treatment as an insane person. Today, I do at last know much more of what was happening to Salvatore during that time, and I shall speak of this at an appropriate place *infra.*

"After the Court of Appeals affirmed the narcotics conviction as to DiPietro and Carmine Panico (June 13, 1963), my own tasks (and the tasks of my colleague Mr. Glasser) in regard to the Panico brothers consisted of awaiting the action of the Supreme Court on the certiorari application in Salvatore's contempt case, and prosecuting the certiorari application in Carmine's narcotic case. As regards both of these tasks, neither I nor Mr. Glasser knew anything more (as I above indicated) concerning Salvatore's psychiatric status than we had known from the July-August 1962 State documents previously described and from our general knowledge that Salvatore remained in confinement at Dannemora Prison Hospital.

* * *

"After the above described happenings of December 1963-January 1964 [our discovery of the actual contents of the Dannemora Clinical Summary] Mr. Glasser and I advised counsel for other defendants of what we had found in relation to the prison-medical records. But by this time, with all of the defendants in jail, we (as counsel) found ourselves severely handicapped in taking any further steps. More than a year then passed, and at length in May 1965, acting on the information above described, Harris B. Steinberg, Esq. who had represented DiPietro in the appeal and certiorari proceedings, wrote to Solicitor General Archibald

Cox setting forth that information and asking for appropriate action by the Solicitor General. In Exhibit E hereto, *infra,* I annex photocopies of Mr. Steinberg's letter to Mr. Cox (May 5, 1965), a companion letter from Mr. Glasser to Mr. Cox (May 11, 1965), and Mr. Cox's reply to Mr. Glasser (June 1, 1965) enclosing a copy of Mr. Cox's reply to Mr. Steinberg (May 28, 1965). Mr. Cox did not find that 'the Court was in any way misled or failed to understand the issues before it" (see Cox letter to Steinberg, *supra,* May 28, 1965, Exhibit E hereto, *infra*).

"That was nearly three years ago. For all of the understandable reasons which handicappingly attend a matter of this kind, where the clients are accounted by all the world as being 'as good as dead' under long prison sentences, this §2255 case has lagged. It may be of interest to the Court for me to mention some of the compounding factors which have prolonged the lag in this case. Salvatore Panico was not released from the New York State prison until somewhat over a year ago, I am informed; and, as the affidavit of Dr. Katz filed herewith indicates, it has been important for us to have Salvatore available for psychiatric interviews under optimum conditions, so that one factor was that we were waiting for Salvatore's release from State Prison. Another factor was that the psychiatric consultant whom we wanted to engage before we found the eminent Dr. Katz, was Dr. Weiss, who had examined Salvatore for the defense in 1962 (*supra*); and for a long time in 1965-1966 we were unable to locate Dr. Weiss, who had moved (to Pennsylvania as we later learned); then,

in the Spring of 1966 we at last located Dr. Weiss as he had meanwhile returned to New York City, to the psychiatric staff of the Kings County Hospital; we then promptly retained Dr. Weiss (around May or June 1966), and we paid him a retainer fee; then about three weeks went by during which we heard nothing from Dr. Weiss, whereupon we telephoned his office at the Kings County Hospital and were told that he had died on the day after we had retained and paid him. We then embarked upon an intensive, nation-wide search for a 'top', qualified psychiatrist specializing in criminology. In instance after instance we ran into the problem that such psychiatrists receive financial grants from either Federal or State governmental programs by reason of which they deem themselves disqualified to counsel or testify for defendants in criminal cases. But in the course of this search we also found that, likewise in instance after instance, the psychiatrists whom we canvassed kept recommending, as the 'top man' in the field, Dr. Jay Katz of the Yale Medical School and Law School faculties. As may readily be imagined, a scientist of the stature of Dr. Katz is a very busy man indeed, and throughout the last months of 1966 we worked at setting up a schedule with Dr. Katz, whom we had at last been fortunate enough to engage. It was decided that it would be best for Dr. Katz to defer interviewing Salvatore Panico until the latter got out of State prison, and could sufficiently stabilize his personal life as well as his relations with the Federal law enforcement authorities, to be able to travel to New Haven, Connecticut for psychiatric interviews with Dr. Katz. It was at last possible to set up a schedule of inter-

views of Salvatore by Dr. Katz for December 1966-January 1967, after Dr. Katz had had opportunity to study the pertinent legal records. Dr. Katz gave us a preliminary report in February 1967. Several intensive conferences then followed, spaced over a period of months in deference to Dr. Katz's schedule. We were not able to get Dr. Katz's report in final affidavit form until March of this year [1968] (said affidavit is filed herewith). My own present affidavit, and those of the movants Carmine Panico and Carlie DiPietro filed herewith, were being readied in the meantime. The real sufferers in this unfortunately long-delayed completion of the present Section 2255 application have been DiPietro and Carmine Panico, but in reciting the above facts I have felt that an explanation for this delay is owed also to the Court and the Government; to which I should add that some of the delay has been caused also by the work load of counsel in other matters, especially the work-load of my colleague Mr. Glasser who, I think the Government knows, is an exceptionally hard-working attorney afflicted with closely-spaced 'deadline' problems."

III

The Government has not (evidently because it cannot) given any effective reply to our description of the serious factual errors in the opinions of both of the Courts below concerning the contents of the Dannemora Clinical Summary and other matters (Pet. Cert., pp. 39-41).

1. Answering our demonstration that both of the Courts below saw fit to leave out the all-important word "psychosis" when they quoted the final Dannemora diagnosis,

the Government states only that the District Court did note the full language of the diagnosis in a footnote to its opinion (Br. In Opp., p. 12), and that both of the Courts below, in elsewhere using only the adjective "psychopathic" did something which "is of no significance" (*ibid.*)—this latter astounding contention of the Government that the difference between "psychosis" and "psychopathic" has "no significance" being not further elaborated in the Brief In Opposition. That the District Court in a footnote to its opinion (Pet. App. 48a, n. 47) quoted the full text of the Dannemora document is hardly convincing to negate the wish-motivated state of mind of the District Judge in view of the fact that in two other places in the District Court's opinion, where that Court was giving written expression to its own understanding of the Dannemora document, it saw fit to refer to the final diagnosis without mention whatsoever of the all-important word "psychosis" (Pet. App. 42a, n. 35, 47a).*

As to the failure of the Court of Appeals to perceive, or even to mention, the all-important medical terminology and medical factor of the word "psychosis" in the final Dannemora report, the Brief In Opposition offers nothing

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* In fairness we note that in still another place in its opinion (Pet. App. 47a, n. 44), the District Court did use the word "psychosis", in addition to the place cited by the Government (Br. In Opp. pp. 12). However, this very conduct of the District Court in indiscriminately, or haphazardly as it were, noting and failing to note the word "psychosis", and especially its omission of that word at the single most significant place in its opinion where it quoted the final Dannemora diagnosis *in capital letters* (Pet. App. 47a), negate the Government's argument that the District Court did actually perceive with proper judicial open-mindedness the factor of *psychosis* in the language of the final Dannemora report.

except the above noted merely conclusory suggestion that this "is of no significance" in evaluating the soundness of the opinion of the Court of Appeals or of its grasp of the real issues of this case (Br. In Opp., p. 12).

2. As to the factual error of the Court of Appeals to the effect that Carmine Panico and Carlie DiPietro had been held in contempt at the first trial of this indictment, before Judge Levet (Pet. Cert., pp. 39-40), the Brief In Opposition is silent. As we suggested at p. 40, Pet. Cert. "This serious error of fact in the Court of Appeals' opinion herein is significant because it indicates the mode of unsatisfactory thinking in what appears to have become a judicial "folklore" attitude among the lower Courts in this case in support of the theory that Carmine Panico and Carlie DiPietro were in a plot with Salvatore to wreck the trial."

3. The Brief In Opposition is likewise silent concerning the Court of Appeals' error in stating that Salvatore Panico at the inception of his outbursts during the 1962 trial was being represented by assigned counsel "who had represented him very capably during the first trial" (Pet. Cert., p. 40). As we stated in our petition for certiorari herein (*ibid.*), "This factual error of the Court of Appeals is another instance of the slippage of factual accuracy on the part of the lower Courts in this case, as they apparently strive for excuses or rationalizations to justify their belief (*never tested in an evidentiary hearing*) that Salvatore's misbehavior was part of a plot to wreck the trial."

4. Nor does the Brief In Opposition reply to our showing (Pet. Cert., p. 41) that the Court of Appeals again factually erred in stating that after Salvatore Panico was gagged and shackled, following his climactic outburst in

the 1962 trial (rushing into the jury box, etc.), "no further incident occurred during the remainder of the trial". As we noted in our petition for certiorari herein (*ibid.*), "This factual error of the Court of Appeals apparently denotes, again, that Court's perhaps wishful thinking that Salvatore was faking his outbursts and that he "sanely" stopped them when firm measures were applied."

5. Above all, it is noteworthy, we submit, that the Brief In Opposition is silent concerning our demonstration at Pet. Cert., p. 41 of what we termed "perhaps the most serious factual error of the Court of Appeals". This item is of sufficient importance we believe—and the Government's apparently studious effort to avoid coming to grips with this item encourages our emphasis—to justify our repeating in this reply brief the passage in question from p. 41, Pet. Cert.:

> "Perhaps the most serious factual error of the Court of Appeals is at p. 9a (Appendix A hereto, *infra*), where, referring to the final Dannemora diagnosis of September 1963 (which the Court of Appeals, at p. 8a, *infra,* misquotes, as above noted, by leaving out the word 'psychosis'), the Court inexplicably states that this Dannemora information of September 1963 'cannot be really considered new because this information was submitted to this Court on direct appeal of the conviction, it was argued by both sides as fact and was considered by us in reaching our decision'. How could the Dannemora medical information of *September 1963*, which did not even become known to anyone until late *November or early December 1963* when the Solicitor General produced it in this Court, how could this information of *September-December 1963*

have been before the Court of Appeals, where Salvatore's contempt conviction was affirmed in *September 1962*, the narcotics appeals were argued in *January 1963*, and those appeals were decided in *June 1963*? This factual error of the Court of Appeals, in which that Court *imagines* it knew all about Salvatore's final Dannemora medical history during the 1962-1963 appeals, is hard to reconcile with any supposition that the Court of Appeals fully mastered the factual record in this §2255 proceeding."

IV

We stated in the petition for certiorari herein (pp. 5, Question 2; and 48 n.) that we would be following up this petition for certiorari with a motion for leave to file, out of time, a petition for rehearing of the denial of certiorari in this case at the October 1963 Term (375 U. S. 940), on the ground of the Solicitor General's indicatedly incorrect presentation to this Court in those 1963 certiorari proceedings concerning Salvatore Panico's final psychiatric diagnosis at Dannemora. After further consideration we (undersigned counsel) have decided that, in our clients' best interests, any such further steps aimed at reviving the 1963 certiorari proceedings should not be taken at this particular juncture; and we respectfully reserve our right, if any, to take such step at another time. We also respectfully adhere to the suggestion in our Question 2 (Pet. Cert., p. 5) that this Court should grant such rehearing *sua sponte* on our within certiorari papers, as an alternative to the granting of certiorari in this §2255 proceeding.

CONCLUSION

It is respectfully submitted that this joint petition for a writ of certiorari should be granted.

December 19, 1969.

Respectfully submitted,

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